No. 14327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable United States Court of Appeals for the Ninth Circuit, and to the Judge Thereof:

Appellees respectfully petition this Court for a rehearing of the decision filed in this matter on August 25, 1955. Appellees urge that this petition be granted for the following principal reasons:

(1) The Court erred in failing to consider or decide whether the employees involved were exempt under Section 13(a)(1) as being engaged in a local retailing capacity.

The tests which are specified in the Act and in the Regulations to determine each of these exemption questions are wholly different from those relating to the coverage question. *In neither case is the fact that the facility is found to be an integrated part of the Anaconda*

enterprise a material consideration. Nor are such factors as the location of the business or the availability of other facilities relevant. Indeed, the tests for each type of exemption are different from the other.

(2) The Court erred in determining that Appellees' facility was not a retail or service establishment upon the same basis that it determined that the activities of the employees involved were covered by the Act, namely, that the facility is an integrated part of the Anaconda enterprise.

(3) The test as to whether the activities of the employees involved were closely related and directly essential to the production of goods for commerce so as to bring them within the coverage of the Act, was improperly applied.

(a) The decision was based upon factual conclusions contrary to facts established either by stipulation or by uncontroverted evidence.

(b) The Court did not apply the full test established by the Act, namely, that the activities of Appellees' employees must be part of a *closely related process* directly essential to the production of goods for commerce.

(c) The Court erred in stating the test of coverage to be whether there is a "substantial need" for Appellees' facility, a test different from that provided by the Act.

(4) A recent decision of the Tenth Circuit Court of Appeals, decided after the instant case was submitted, is persuasive authority here and should be considered by the Court.

I.

The Court Did Not Rule Upon or Consider in Its Opinion Whether Appellees' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) exempts from the relevant sections of the Act any employee employed in a local retailing capacity. Although raised in Appellees' brief, the Court did not consider the application of this section.

Under this exemption the job duties of the particular employee in question must be considered. If these duties are of a retailing nature as defined by the Administrator, the exemption must apply. *The fact that an employee is employed by a facility which is a part of a non-retail establishment or by one integrated with a producer of goods for commerce, is immaterial in determining whether he is exempt.* Neither are such considerations as the location of the enterprise or the availability of other facilities.

Section 13(a)(1) provides:

> "The provisions of Section 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, . . . (as such terms are defined and delimited by regulation of the Administrator): . . ."

The Administrator of the Act was given specific authority to establish the criteria for this exemption. He has done so as follows:

> "The term 'employee employed in a bona fide * * * local retailing capacity,' in Section 13(a)(1) of the Act, shall mean any employee:

"(a) who customarily and regularly is engaged in:

"(1) Making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or

"(2) Performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

"(b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (2) of this section do not exceed 20 per cent of the hours worked in the workweek by nonexempt employees of the employer."

29 C. F. R. Chap. V, §541.4.

It has been *stipulated* that more than 50%, indeed 100%, of the dollar volume of sales of goods or services are made within the State of California, the place of employment [Tr. 29, 73]. It has also been stipulated that all of the meals served, goods sold or lodging furnished by Appellees are to persons who consume such meals or goods or utilize such services locally. [Tr. 29, 73]. Over 75% result from the dining and commissary operations alone [Tr. 64-65]. There can be no question that by very definition such are retail sales and services. Nor can there be any question that each employee performs work immediately incidental to, indeed directly involved in, the sale of such goods or services. Not only 80%, but 100%, of the hours of work are involved in such activities.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Appellees are exempted according to the tests established by this section. The duties of such employees are described in the Stipulation of Facts [Tr. 27-29], and were incorporated in the Findings of Fact [Tr. 66-68] as follows:

> "Chef: * * * The chef is responsible for preparation of all foods and efficient serving thereof. In collaboration with the manager, he makes up daily menus. He is directly responsible for the dining room and kitchen crew and he has the authority to hire and fire in his department. He makes up requisitions for supplies and on occasion prepares food to take out by anybody who desires to buy food to take out. He also has the authority to make local purchases if needed. He also prepares all bakery products with the exception of bread.
>
> "Second Cook: * * * The second cook assists the chef in the preparation of all foods, including bakery products. It is customary for him to prepare the morning breakfast so that the chef can come in at a later hour. The second cook is capable of taking over the chef's job when the occasion demands. This can happen and does happen once in a while. The second cook works under the direct orders of the chef and does any and all work assigned to him by the chef.
>
> "Dishwasher: * * * The dishwasher washes dishes. He is responsible for his dishwashing department and the dishwashing machine and other

equipment installed therein. He also does general clean-up work in and around the kitchen as required. He also washes pots and pans as required.

"Waiter: * * * A waiter serves food to the customers seated at tables in the dining room. Each waiter has a station consisting of four tables of eight places each. A waiter keeps his station clean, cleans the tables after each meal and resets them. He also, with other waiters, sweeps the dining room and once or twice a week mops the dining room floor.

"Combination Man: * * * This man is qualified to wait on tables and to wash dishes but his primary job is to help keep the kitchen and the equipment clean. This man also peels vegetables and does miscellaneous odd jobs delegated to him by the chef. He also helps to unload supply trucks and stores supplies in the storeroom.

"Janitor: * * * A janitor does janitor work. He is responsible for keeping the dormitory building clean and in order. He makes beds, handles linens and blankets and miscellaneous bedding. He sweeps floors, keeps bathrooms and showers clean and does related work. He also, on occasion, relieves the commissary clerk."

According to undisputed facts alone and in accordance with the Administrator's regulations the employees are exempt as engaged in a local retailing capacity.

The nature of the employer's business under this exemption has little or no bearing. The Administrator himself has recognized that this is the interpretation required by the specific language of the Act.

The Administrator has stated:

> "* * * . . . the section 13(a)(1) local retailing capacity exemption depends on the capacity in which the particular employee is employed, and not on the character of the establishment in which or by which he is employed. It is not material, therefore, in determining the applicability of the section 13(a)(1) exemption to any particular employee, whether the establishment in which or by which he is employed is a retail or service establishment or a wholesale or a manufacturing establishment. Thus, for example, an employee of a wholesale or a manufacturing establishment who is employed in a local retailing capacity as that term is defined by the Administrator, may be exempt from the wage and hours provisions of the Act even though the other employees of the establishment are nonexempt. * * *"
>
> 29 C. F. R. Ch. V, §779.28.

This exemption, therefore, as is true of Section 13(a)(2), cannot be disposed of as part of the determination concerning the coverage question. Whether the facility is or is not an integrated part of the Anaconda enterprise is irrelevant. It is necessary that a rehearing be granted to consider this question.

II.

The Applicability of the Retail or Service Exemption Cannot Be Determined by Applying the Same Tests Which Determine Whether the Employees Are Covered by the Act.

In determining that the Appellees' facility was not a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, the Court said:

> "However, we are of the opinion that the evidence conclusively establishes, as we have concluded, that the facility is an integrated part of the Anaconda enterprise and that such conclusion is inconsistent with any conclusion that it is a retail enterprise." (pages 6-7 of the Opinion.)

But the tests for determining what constitutes a retail or service establishment are *entirely different* from and independent of those determining whether an employee's activity is closely related or directly essential to the production of goods for commerce.

The test for determining whether the employees involved are covered by the Act is whether or not they were employed "in any closely related process or occupation directly essential to the production" of goods for commerce. In applying this test factors such as remoteness, availability of other facilities and integration with the producer for commerce may be considered relevant.

But once it is decided that the employees are covered by the Act such factors are no longer material. It is then necessary to apply the tests specifically enumerated in Section 13(a)(2) of the Act to determine whether or not the *establishment* employing such employees is a retail or service establishment as defined by that section. These

tests are wholly independent of any determination concerning the coverage of the Act. To decide both questions without an independent consideration of the specified factors established as criteria by Section 13(a)(2) is to read that section out of the Act contrary to the clear Congressional mandate.

Section 13(a)(2) of the Act provides:

> "Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

This definition sets up three criteria only to determine what constitutes a retail or service establishment:

(1) Whether more than 50% of the establishment's annual dollar volume of sales of goods or services are made in California.

(2) Whether 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, are for resale.

(3) Whether 75% or more of the establishment's sales or services are recognized as retail sales or services in the particular industry.

The text of the House Manager's Statement reporting on the House-Senate conference bill which contained the 1949 amendments as enacted into law by signature of the

President on October 26, 1949, is very relevant in explaining the requirements of Section 13(a)(2). Pertinent excerpts from this statement are set forth in the Appendix.

When the *Womack* case was decided, the tests applicable to the coverage and to the retail exemption questions were both very general although quite different even then. The 1949 amendments, however, establish specific criteria for determining the retail exemption question. These criteria are unrelated to those relevant to the coverage question.

For example, the Court in the instant case quotes from *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, 435 in pointing out that the applicability of the Act ' "is determined, not by the nature of the employer's business, but by the character of the employee's activities" ' (page 3 of the Opinion). This is one of the bases of the Court's decision concerning the coverage question.

Yet, in determining whether the retail or service exemption applies it *is* the nature of the employer's business and *not* the character of the employee's activities which is controlling.

With respect to the facts which bear upon this issue, the Court refers only to the testimony of one witness and then not in connection with the purpose for which that testimony was introduced along with other substantial evidence, namely, to establish the third requirement of Section 13(a)(2).

The first two criteria set up by Section 13(a)(2) were established by stipulation and incorporated in the Findings of Fact as follows:

> "All of defendants' annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.

"All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California." [Tr. 29, 73.]

Indeed over 75% of the total annual dollar volume results from the dining and commissary operations alone [Tr. 64-65].

It was therefore only necessary to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available.

The testimony of the official of the National Restaurant Association was only a part of this evidence and was adduced not to show that the facility constituted a retail establishment under the Act but to show that the sales of goods and services were recognized and known as retail sales and services in the restaurant industry. That this is most relevant testimony is shown by the Congressional history of the 1949 amendments. Senator Holland, who was the sponsor in the Senate of the amendment to Section 13(a)(2), which was later enacted into law, said in debate on the amendment concerning the practice of a trade association:

"Mr. Douglas: Its iterpretation would be very persuasive, would it not, even if not controlling?

Mr. Holland: Yes, it would be quite persuasive." (95 Cong. Rec. p. 12501.)

Appellees introduced the following substantial evidence to show the existence of the third criterion for exemption. This evidence is uncontradicted.

(a) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and its proposed 1953 Census of Business placed Appellee's type of activity in the category of a retail trade [Tr. 152-153; Def.-App. Ex. F.]

(b) Testimony and documents were introduced to show that the United States Office of Price Administration during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry [Tr. 153-154; Def.-App. Ex. G].

(c) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified among other things that Appellees were members of that Association; that the term "retail sale or service" has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same manner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were introduced as further proof of the foregoing [Tr. 148-154; Def.-App. Exs. A to E, incl.].

(d) It was stipulated that the Secretary of the Southern California Restaurant Association would testify sub-

stantially the same with respect to the Southern California area [Tr. 150, 160-161; Def.-App. Ex. H].

The evidence shows that the trade associations of which Appellees are a part both national and state, the United States Census Bureau and the United States Office of Price Administration during its existence, all recognized that Appellees' sales and service are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof.

In order to show that the retail or service exemption applied it was necessary for Appellee to show only the existence of three specified criteria. Two were established by stipulation and the third by substantial and uncontradicted testimony. There is therefore no proper basis for concluding that Section 13(a)(2) is inapplicable to Appellees' establishment.

The availability of other facilities, remoteness, integration with the Anaconda enterprise and similar factors which were the basis of the Court's decision on the coverage question, are not relevant considerations in determining whether the Section 13(a)(2) exemption is applicable.

The basis upon which the court determined the exemption questions makes Section 13(a)(2) meaningless. The Court in its Opinion has not considered the specified requirements of that section or the facts established by stipulation and by uncontradicted evidence relating to those requirements. Nor has it considered the significance of the fact that it is the *establishment*, not the activities of the employees, which controls the application of the exemption.

We respectfully urge that the foregoing reasons justify a reconsideration of this case by the Court.

III.

The Test as to Whether the Activities of Appellees' Employees Were Closely Related and Directly Essential to the Production of Goods for Commerce Was Improperly Applied.

A. The Court Did Not Apply the Full Test Established by the Act, Namely, that the Activities of Appellees' Employees Must Be Part of a Closely Related Process Directly Essential to the Production of Goods for Commerce.

The Administrator himself has held that, in addition to a finding concerning the "directly essential" nature of the employees' activities, a finding must also be made that such activities are part of a "closely related process." There is a definite and clear distinction between the two.

> "The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. * * * Under the amended language, an employee is covered if the process or occupation in which he is employed is *both* 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce.
>
> * * * * * * * *
>
> "Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to the production meet the 'closely related' test."
>
> 29 C. F. R., Ch. V, §776.17.*

It is clear from the Congressional history that the framers of the 1949 Amendments intended that for an

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*Emphasis ours unless otherwise indicated.

employee to be covered he must be engaged in a process closely related to the production of goods for commerce. In debates in the House concerning the conference bill later enacted into law, Mr. McConnell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

> "First—and this is important—the coverage of the act for a large number of employees is dependent upon the definition of 'production of goods and commerce.' A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the coverage to occupations which are not closely related *and* directly essential to production." (95 Cong. Rec. 14936.)

The Court does not consider in its opinion or decide that the activities of the employees involved are closely related to the production of goods for commerce.

We respectfully submit that the activities of employees involved were not closely related to the production of goods for commerce and urge that a consideration of this question is required.

B. The Decision Was Based Upon Factual Conclusions Contrary to Facts Established Either by Stipulation or by Uncontroverted Evidence.

The Court on page 4 of its Opinion states:

> "However, in each instance the facility furnished was without a question needed, and without it the production would have been affected."

But the Findings of Fact which are based upon stipulated facts and uncontradicted evidence are specific that

the effect upon production would not be substantial eve if Appellees' facilities were abandoned entirely.

Finding of Fact No. 19 states:

> "In the event that the sales and services provide by [Appellees] at their Darwin operation should b curtailed or abandoned entirely there would be onl a temporary inconvenience to the operation of th mine; the effect upon production at the mine woul be unsubstantial even during this temporary period There would be no significant effect upon total ship ments from the mine, particularly in view of stock of ore that are kept in reserve. During the perio of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from th mine were not affected as a result thereof." [Tr 68-69.]

The trial court, again based upon stipulation or uncontradicted evidence, further found that:

Only 20 to 25% of the employees employed by Anaconda utilize Appellees' facilities at all [Tr. 55].

Almost one-half the number of employees living at Appellees' facilities live in neighboring communities and commute daily to and from the mine [Tr. 55-56].

Fifty per cent of the employees who live at Appellees' facilities own their own automobiles and the remaining employees ride with them when there is a need or occasion for transportation [Tr. 58-59].

All of the communities involved are connected by paved two-lane highways open all year [Tr. 58-63].

The children of mine employees attend school daily at the substantial town of Lone Pine [Tr. 72].

Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition [Tr. 69].

Appellees' type of facility is becoming less and less frequent as a means of providing food and accommodations for mining employees. On several occasions facilities similar to those of Appellees, and under circumstances similar in material respects to Appellees' Darwin operation, have been curtailed, abandoned or destroyed without affecting either the production of the mine or the availability of employees [Tr. 69-71].

It is frequent that substantial numbers of employees at various mines, in some cases as many as one-half will live at a distance equal to that of the Darwin mine from the town of Lone Pine and commute daily to and from the mine, because of improved highways, better transportation and the desire for community living [Tr. 69-70, 71-72].

Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition [Tr. 69].

On the basis of these and many other facts in the record [Tr. 14-30, 52-74] which are either stipulated or based upon uncontradicted and substantial evidence, we believe that the conclusion that there is a substantial need for these facilities is erroneous, even assuming that to be a test.

C. The Court States the Test of Coverage to Be Whether There Is a "Substantial Need" for Appellees' Facility a Test Different From that Provided by the Act.

We urge that the determination of substantial need for Appellees' facility is insufficient to meet the requirement of the Act. This was not the test established by Congress. That test requires that the activity of the employees involved must be closely related and directly essential to the production of goods for commerce. Food and lodging of course is a requirement of all employees. This however does not mean that the function of *providing* food and lodging must be closely related and directly essential to the production of goods for commerce.

The Administrator himself states that employees employed in a restaurant "to provide a convenient means of meeting personal needs of his employees" are not within the Act and that such employees are not engaged in work closely related and directly essential to the production of goods for commerce. Similarly, he states that "employees of the producer or of an independent employer who are engaged only in maintaining company facilities for * * * providing food, refreshments, or recreational facilities, including restaurants, cafeterias and snack bars, for the producer's employees in a factory * * * would not be doing work 'directly essential' to the production of goods for commerce." (29 C. F. R., Ch. V, Part 776, §18(b).)

This Court states:

> "It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper. (P. 4 of the Decision.)

However, the United States Supreme Court has stated:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other."
>
> *McLeod v. Threlkeld,* 319 U. S. 491, 497, 87 L. Ed. 1538, 1543-1544.

In that case the employees provided meals for maintenance-of-way employees of a railroad by means of a dining and kitchen car which was set at the place of work of the boarders. Because of the very nature of the work, the employees would have to utilize such facilities since on many if not most occasions no others would be available in the various desolate areas where this type of work had to be done.

We respectfully submit that whether a question affecting commerce or one involving the production of goods for commerce is immaterial to this result, as the Supreme Court in that case indicates where it says:

> "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce *or in the production of goods*

for commerce' . . . The selection of the smaller group was deliberate and purposeful."

McLeod v. Threlkeld, 319 U. S. 493, 87 L. Ed. 1541.

Judge Yankwich, in discussing the applicability of the *McLeod* case in *Tipton v. Bearl Sprott Co.* (S. D., Cal. 1950), 98 Fed. Supp. 496, discussed below, similarly concluded where he states:

"In McLeod v. Threlkeld, 1943, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, the question did not turn upon the provision which we are considering now. It turned upon the proposition whether McLeod was engaged 'in commerce.' Nevertheless, because his occupation related to nutrition,—to feeding,—the case has a significant bearing upon the problem before us."

* * * * * * * *

"The language used . . . is very revealing. . . ."

Tipton v. Bearl Sprott Co., 93 Fed. Supp. 496, 501.

The court in *Kuhn v. Canteen Food Service* (N. D., Ill., 1944), 77 Fed. Supp. 585, similarly states:

". . . the furnishing of the food is as remote from the production of goods for commerce as it is remote from commerce; the furnishing of the food is as remote from the production of goods for commerce as in cases where the employees supply themselves; and in the case of furnishing food to a maintenance-of-way man engaged in commerce, the food would be as necessary for the continuance of his labor, as the continuance of the labor of a man engaged in the production of goods for use in commerce."

Kuhn v. Canteen Food Service, 77 Fed. Supp. 585, 590.

We believe that the history of *McComb v. Factory Stores Co.* (N. D., Ohio, 1948), 81 Fed. Supp. 403, requires a contrary result from that reached here. That case involved a question as to whether the Act covered persons employed by an industrial eating facility similar to that in this case. The facility was located in a plant. Under the contract between the facility and the Republic Steel Corporation, outlined in the decision, the latter kept as much, if not more control over the operation of the facility as is present here. Most of the items relied upon by the Court here were present in that contract. The employees were not permitted to leave the plant and were therefore required to eat at the facility, unless they saw fit to bring their own lunch or utilize a few lunch wagons. Furthermore, even if they could have left the plant "The location of the plant . . . makes it impractical for the men to eat at outside restaurants" and "it would be difficult if not impossible with the available transportation facilities" to do so. (81 Fed. Supp. 403.)

The court in the *Factory Stores* case held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal before the Sixth Circuit Court of Appeals, it was brought under criticism in Congress and was the subject of much comment. It was in effect repealed by the 1949 amendments. As a result, the case was remanded to the Federal District Court where it was dismissed.

Factory Stores Co. v. McComb (6th Cir., 1949), 179 F. 2d 238.

The criticism and consequent expression of intent by Congress concerning this case as shown in the following

excerpts from the legislative history of the 1949 amendments are most relevant. The House Manager's Statement* on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949, states as follows:

> "Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N. D. Ohio, 1948)).
>
> "Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. . . ."
>
> * * * * * * * *
>
> "The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:
>
> * * * * * * * *
>
> "All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."
>
> 95 Cong. Rec. 14928, 14929.
>
> * * * * * * * *

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*HR Report No. 1453, 81st Congress, 1st Session, October 17, 1949.

Mr. Lucas in his statement concerning the proposed change in Section 3(j) establishing the coverage test, said:

> "Nor could the Administrator hold the act applicable as he has in the past to the following:
>
> "(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory—McComb v. Factory Stores Co. (81 F. Supp. 403)."
>
> 95 Cong. Rec. 11216.

The Court's opinion in the instant case states:

> "It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper. * * *" (p. 4.)

We urge that such a finding is directly contrary to the legislative intent as demonstrated by the history of the *Factory Stores* case, since it would require the very result which Congress overruled in its consideration of that case.

Furthermore, the Court finds that the activities of the employees here "was directly essential to the production of ore for commerce, just as in *Womack* the employees in the cook houses were performing a service *necessary* to the production of logs for commerce." (pp. 4-5, emphasis by the Court.) In doing so it equates "directly essential" with "necessary," the very result Congress sought to correct. Such a finding we urge does not give effect to the significant changes made by the 1949 amendments.

IV.

A Recent Decision of the Tenth Circuit Court of Appeals, Decided After the Instant Case Was Submitted, Is Persuasive Authority Here and Should Be Considered by the Court.

On July 26 of this year, the Tenth Circuit Court of Appeals, in *Juarez v. Kennecott Copper Corp.* No. 504 (1955), 12 WH Cas. 607, handed down a decision which is direct authority in support of the position of Appellee in this case. In the *Juarez* case the mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related to the production of goods for commerce and so essential thereto as to place them within the coverage of the Act.

In finding that the work of the employees in the hospital was not closely related or directly essential to the production of goods for commerce, the Court stated:

> "Apparently no case involving employees of a company owned hospital has come before the courts. The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods or *in any closely related process* or occupation directly essential to the production thereof, in any State.' We think it

is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949, W.H.M. 6:607) states, 'The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403, 8 WH Cases 284 (N. D. Ohio) 1948).'

" 'Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases.' " (Emphasis by the Court.)

Juarez v. Kennecott Copper Corp., 12 WH Cases 607, 609.

We believe that this decision and its consideration of Congressional intent is persuasive and supports the necessity for a rehearing in this case.

For the foregoing reason we respectfully urge that the Court grant this Petition for Rehearing.

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Attorneys for Appellees.

Certificate of Counsel.

The undersigned hereby certifies that he has prepar this Petition for Rehearing and that the grounds there stated are in his opinion well founded and that this Pe tion is not filed for reasons of delay.

WILLIAM FRENCH SMITH.

APPENDIX.

The House Managers' Statement reporting on the House-Senate Conference bill which contained the 1949 amendments as enacted into law is very relevant in explaining the three requirements of the retail exemption contained in Section 13(a)(2). Pertinent sections are as follows:

"Exemptions

"General statement.—The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . ."

* * * * * * * *

"Retail and service establishments.—Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

"The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* (E. D. Pa. 1949), 16 Labor Cases, Par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)).

"Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

"First, over 50 per cent of the establishment's sal by annual dollar volume of goods or services mu be made within the state in which the establishme is located. The requirement that the greater pa of the selling or servicing be in intrastate commerc found in the present law, is eliminated because of th tendency of the courts to hold that many sales c services made or performed within a state are n intrastate sales or services. See *Kirschbaum v. Wal ing* (316 U. S. 517, 526); *Boutell v. Walling* (32 U. S. 463, 467). Under the new test, if the sal are made within the state in which the establishmer is located, it is immaterial that the sales (a) are mad pursuant to prior orders from customers, (b) cor template the purchase of goods by the establishmer from outside the state to fill customers' orders, o (c) *are made to customers who are engaged in inter state commerce or in the production of goods fo interstate commerce.* In this connection, see *Wallin v. Jacksonville Paper Co.* (317 U. S. 564).

"The second test provides that in order for a establishment to be exempt, not less than 75 per cen of its annual dollar volume of sales of goods o services (or both) must not be for resale. In othe words, at least three-fourths of the goods or service (or both) sold must be to purchasers who do not bu for the purpose of reselling. Normally, goods ar to be considered as sold for resale even though th purchaser sells them in an altered form. . . ."

"The third test provides that 75 per cent of th establishment's annual dollar volume of sales of good or services (or of both) must be recognized in th particular industry as retail sales or services. *Under this test any sale or service, regardless of the typ of customer, will have to be treated by the Admin istrator and courts as a retail sale or service, so long*

as such sale or service is recognized in the particular industry as a retail sale or service.

"The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act."

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).